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No. 10,191

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

N. N. S. MATCOVICH,

Appellant,

vs.

RICHARD NICKELL, as Collector of Internal Revenue for the First District of California,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Under the head of "Summary of Argument" on page 6 of his brief, appellee says, "The bill discloses that the dancing ladies were procured by tax payer." A similar statement is made on page 8 under the head "Argument". There is nothing in the complaint, however, that sustains this statement and it is, therefore, not correct.

The bill of complaint sets out in full the agreement between the plaintiff and these ladies. This agreement states definitely that the relationship is that of licensee and licensor and provides that the ladies pay for the

privilege of dancing. (Tr. page 4.) The complaint also states, "That no other agreement of any kind was ever entered into between said plaintiff and said ladies." (Tr. page 5.) The allegations, together with those set out in our opening brief, show the relationship. The relationship is a question of fact. The motion to dismiss admits these facts and the appellee is bound thereby. Obviously, if the relationship of licensor and licensee exists, the tax levied is certainly illegal.

We do not think anything would be gained by a review of the cases cited by appellee, since the rule is quite definitely established by the two cases cited in our opening brief.

On page 11 of appellee's brief, some reference is made to another suit brought by plaintiff herein against the former collector, Anglim. However, the only matters that this Court can consider at this time are those stated in the complaint. We might say, however, that where the appellee permitted the accumulation of alleged taxes for a three year period without taking any steps to enforce the collection and plaintiff did not make those payments because he relied upon a State Court decision in his favor holding that the relation of employer and employee did not exist, the equities here involved are entirely different from those involved in the earlier case. That case is now on appeal to this Court. The accumulations of the taxes for a period of three years reached an amount that plaintiff was unable to pay.

The admitted facts are:

That before the ladies were permitted to dance a license agreement was entered into. (Tr. page 4.) That no other agreement was entered into. (Tr. page 5.) That said ladies during said period danced in said premises under the license issued to them by plaintiff and by and under no other agreement or arrangement. (Tr. page 5.) That said agreement expressly provided that it was the intent that licensee should not become an employee and not subject to plaintiff's control. (Tr. page 4.) That she paid for the privilege of dancing. (Tr. page 4.) These admitted facts show that no relation of employer and employee existed and hence there could be no tax levied.

It is also admitted:

That plaintiff has no plain, speedy or adequate remedy at law except to pay and then sue. (Tr. page 5.) That plaintiff is unable to pay the said tax assessed without working serious and irreparable damage to his property and business, which could not be subsequently remedied by the recovery of this tax by suit after payment. (Tr. page 6.)

That if defendant seizes and distrains the property of plaintiff and sells the same, plaintiff's entire business will be lost and destroyed, which will result in irreparable damage to him. (Tr. page 6.) Facts are then stated giving the reason for nonpayment and that a large accumulation resulted which plaintiff is unable to pay. (Tr. pages 6-8.)

Under the rule laid down in *Midwest Haulers v. Brady,* 128 F. (2d) 496 (C.C.A. 6th), these admitted facts justify the intervention of equity.

Dated, Sacramento, California,
October 30, 1942.

Respectfully submitted,
R. H. Schwab,
Attorney for Appellant.